76-1774

NO.

Supreme Court, U. S.
FILED
JUN 13 1977
MICHAEL RODAK, JR., CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

HELEN McCAFFREY JACKSON and ANDREW J. JACKSON, individually and in their own right and as parents and guardians of ANDREW McCAFFREY JACKSON and MARY ELLEN JEFFERS, individually and in her own right and as parent and guardian of THERESE JEFFERS, MARY ELLEN JEFFERS and ELAINE JEFFERS, minors, and ANNE JEFFERS,

Petitioners

vs.

ASSOCIATED HOSPITAL SERVICE OF PHILADELPHIA, a/k/a BLUE CROSS OF GREATER PHILADELPHIA, PENNSYLVANIA BLUE SHIELD, HERBERT S. DENENBERG, AND WILLIAM J. SHEPPARD, INSURANCE COMMISSIONERS OF PENNSYLVANIA and J. FINTON SPELLER, M.D. and LEONARD BACHMAN, M.D., PENNSYLVANIA SECRETARIES OF HEALTH,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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1. The Court of Appeals for the Third Circuit and the United States District Court for the Eastern District of Pennsylvania have decided important questions of federal law which have not been, but should be decided by this court; namely:

(a) whether 42 U.S. 1985(3) reaches a conspiracy to deny a person or persons of their constitutional or civil rights or is limited merely to a "class" as held below;

(b) whether women and subscribers who choose to have a live child rather than an abortion and who cannot have an abortion for religious reasons constitute a class within the meaning of §1985(3) so that they cannot be denied equal protection of the laws, freedom of religion and right to privacy. The courts below held they did not constitute a "class" and that §1985(3) reaches only classes;

(c) whether a Complaint alleging a violation of §1985(3) must be dismissed for failure to state a cause of action because it did not use the words "invidiously discriminatory animus".

The decision is in conflict with Estelle v. Gamble, ___U.S.___,97 S.Ct. 546; Cooper v. Pate, 378 U.S.546, 84 S. Ct.1733; Griffin v. Breckenridge, 403 U. S.88, 91 S.Ct. 1790.

2. The Court of Appeals for the Third Circuit and the District Court erroneously held that plaintiffs' claims were barred by Geduldig v. Aiello, 417 U.S. 484, 94 S.Ct.2485, whereas the instant case involves religious as well as sex discrimination, and involves hospitalization benefits where women must pay three and a half times more premiums than men pay, and obtain almost one-third less hospital days even with pregnancy included. The opposite was true in Geduldig which involved disability benefits. The state in Geduldig barred all claims for normal pregnancy and did not discriminate against live birth and in favor of abortion.

3. The Third Circuit Court of Appeals and the District Court have decided a federal question in a way which conflicts with Jackson v. Metropolitan Edison, 419 U.S. 345, 95 S.Ct.449; Burton v. Wilmington Parking Authority, 365 U. S. 715, Evans v. Newton, 382 U.S.296, and Cleveland Board of Education v. La Fleur, 414 U.S. 632,94 S.Ct. 791.

4. The Third Circuit Court of Appeals has rendered a decision which conflicts with the decision of the Sixth Circuit Court of Appeals in Meredith v. Allen County War Memorial Hospital, 397 F.2d 33.

5. The pregnancy provisions of the Blue Cross and Blue Shield contracts are mere pretexts designed to effect invidious discrimination against women who terminate their pregnancies by live birth and in favor of women who terminated their pregnancies by abortion and in favor of men. Gilbert v. California, ___U.S.___97 S.Ct. 401.

Conclusion

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Opinion of Court Below Denying Rehearing by Court in Banc A1

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Opinion of the District Court A-3

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO.

HELEN McCAFFREY JACKSON, et al.,

Petitioners

vs.

ASSOCIATED HOSPITAL SERVICE OF PHILADELPHIA, a/k/a/ BLUE CROSS OF GREATER PHILADELPHIA, et al.,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in Helen McCaffrey Jackson et al., vs. Associated Hospital Service of Philadelphia, a/k/a Blue Cross of Greater Philadelphia, et al., C.A. 76-1936 denying plaintiffs' petition for rehearing before the Court in Banc on March 15, 1977, and affirming the Order of the United States District Court for the Eastern District of Pennsylvania on February 16, 1977 which Order dismissed plaintiffs' action alleging lack of jurisdiction and failure to state a cause of action.

Opinions Below

On March 15, 1977, the United States Court of Appeals for the Third Circuit denied plaintiffs' petition for rehearing before the court in banc. A copy of the denial appears in the Appendix as Exhibit A, p.1. The opinion of the United States Court of Appeals for the Third Circuit affirming the Order of the United States District Court for the Eastern District of Pennsylvania was not reported. It appears in the Appendix as Exhibit B, p.2. The opinion and order of the United States District Court for the Eastern District of Pennsylvania per the Hon. Daniel H. Huyett dismissing plaintiffs' action on the alleged ground of "lack of jurisdiction" is reported in 414 Fed. Supp. 315, and appears in the Appendix as Exhibit C , p.4 to 26

Jurisdiction

This Court has jurisdiction to review the judgment under the provisions of 28 U.S.C. 1254. This is an appeal from a final judgment of the United States Court of Appeals for the Third Circuit entered March 15, 1977 denying our Petition for Rehearing before a Court In Banc, following that court's affirmance on February 15, 1977 of an Order and judgment of the United States District Court for the Eastern District of Pennsylvania dismissing the plaintiffs' complaint and action.

Questions Presented

1. Did the courts below err in holding that there was no state action and no conspiracy under 42 U.S.C.1983 and 1985 (2)and(3) by the actions of the defendants, Blue Cross of Greater Philadelphia, Blue Shield and the Commonwealth in engaging in sex and religious discrimination, denial of privacy, equal protection of the law, due process and violation of constitutional rights, in their contracts, subscription agreements, rates, policies, procedures and insurance which are required to be approved by the Insurance Department of Pennsylvania, where Blue Cross and Blue Shield are quasi-public, tax-exempt organizations; where Blue Cross has public directors appointed by the Governor, Mayor, etc.; where the Insurance Department and various state commissions have studied and issued decisions and regulations on pregnancy coverage and have encouraged and condoned the discriminatory practices; where Blue Cross and Blue Shield have violated the terms of its contracts, subscription agreements and policies on pregnancy coverage for many years, and where the Insurance Department knows of the violations and has encouraged, condoned and acquiesced in same?

2. Did the courts below err in dismissing the Complaint for failure to state a cause of action under §1985(3) and err in holding that the Complaint failed to allege a readily discernible class and an "invidiously discriminatory animus" especially where none of the defendants objected on this ground?

3. Where the District Court finds:(a) that the practices complained of are discriminatory; (b) that the state has known of such problems since at least 1971 and has focused upon them and investigated such practices; (c) that on March 4, 1971, the State through its Insurance Commissioner suggested to other defendants that maternity benefits (not abortion) be excluded from coverage; (d) that the state has issued regulations that defendants need not report restrictions on pregnancy coverage; (e) that an inordinate delay between a state inquiry or investigation into such practices coupled with evidence of informal or covert encouragement may give rise to state action, did the Court of Appeals and the District Court err and abuse their discretion in failing to find state action, conspiracy or that the delay is inordinate?

Statement of the Case

On December 26, 1973, plaintiffs filed an individual and class action complaint, No.73-2908, on behalf of themselves and other subscribers, averring that the defendants[1] violated their

[1]Hereinafter,defendant,Associated Hospital Service of Philadelphia,a/k/a Blue Cross of Greater Philadelphia will be referred to as Blue Cross; defendant Medical Services of Pennsylvania,a/k/a Pennsylvania Blue Shield will be referred to as Blue Shield; defendants Herbert S.Denenberg and William J. Sheppard,individually and as Insurance Commissioners of Pa. will be referred to as Insurance Commissioners; and defendants J.Finton Speller, M.D. and Leonard Bachman,M.D., Pennsylvania Secretaries of Health will be referred to as Secretaries.

rights to freedom of religion and privacy and discriminated against women; denied their right to equal protection of the laws; charged them discriminatory increased rates while denying them equal benefits, and denied these and other rights guaranteed the plaintiffs under the First, Fifth, Ninth and Fourteenth Amendments to the United States Constitution, the Civil Rights Act of 1871,42 P.S.1981,1983 and 1985, the Equal Rights Amendment to the Pennsylvania Constitution and various other federal and state statutes and laws.

The plaintiffs are subscribers to Blue Cross and Blue Shield and were such for many years prior to making any claim for pregnancy benefits. All of the plaintiffs are Catholic and exercised their constitutional right to bear children. For religious reasons, they cannot choose abortion for themselves or their minor daughters.

The defendants, Blue Cross and Blue Shield, are tax exempt, non-profit health insurance companies created pursuant to state statutes 40 P.S.1401 et seq. & 6101 and 40 P.S.1431 et seq & 6301. The legislature has declared both companies necessary for the physical and mental health of the residents of the Commonwealth, 40 P.S. 6303 and 1402. The legislature has held that it is the duty of the State to provide for the health and medical services of its residents 16 P.S.120001 §2.

Blue Cross and Blue Shield are the vehicles the State developed to provide the service and to which it delegated its duty. They are exempt from insurance laws of the Commonwealth. Blue Cross is under the direct control and supervision of the

Insurance Department (40 P.S.1437(f), 6122,6123). Blue Shield is under the direct control of both the Insurance Department and Health Department (40 P. S.1402,6103.40 P.S.1437,6307). Blue Cross and Blue Shield are almost totally controlled by the state. All of their contracts, policies, subscription agreements, certificates, rates charged and rate of payments to hospitals, doctors and even their advertising costs must by law have the prior approval of the Insurance Department.

Blue Cross has seven public directors appointed by the Governor, Mayor, etc. pursuant to the requirement of the Insurance Commission on March 5, 1971.

The other defendants are the Insurance Commissioner and the Secretary of Health of the Commonwealth of Pennsylvania.

The defendants through the device of economic benefit for abortion and economic penalty for live birth, violate the subscription agreements and discriminate against women and subscribers who elect to terminate pregnancy by live birth. They force, inveigle and induce subscribers to have abortions by economic coercion. Women who have live birth: (a) must have "family" coverage at three and a half times the rate of single coverage; (b) must be in the "family" plan eight months; (c) get only six days coverage; (d) must be either the applicant or spouse. Coverage for live birth does not extend to minor children of the applicant; (e) receive only $90 toward their doctor's bill. Then, even when many subscribers, like plaintiffs, Helen McCaffrey and her husband, have paid the family rate for

many years, defendants arbitrarily list them under "Husband-Wife-no maternity" category and refuse to pay the hospital bills. The rate charged for "Husband-Wife-no maternity" is identical with the "Husband-Wife-maternity" and "Family" rate.

On the other hand, women who choose abortion: (a) can have single coverage: (b) are not subject to any waiting period; (c) get from 30 to 365 days coverage; (d) do not have to be applicants or spouses, but can be the minor children of applicants' (e) get up to $300 for their doctors' bills.

Under the provisions of Co-Pay Comprehensive Subscription Agreement -Form HC5-B involved herein, and under most group contracts and all non-group contracts, there is neither authority or justification for treating a termination by abortion different from a termination by live birth.

The first paragraph of the contract provides on page 3,"Article III, Pregnancy Benefits. Hospitalization benefits in an Approved Hospital as described in Section I of this Agreement and as modified by this Section shall be available only to an Applicant Subscriber or spouse of applicant enrolled under a Family Agreement in cases of pregnancy or any disease, injury or condition arising therefrom, provided, however, that in either case, such Family Agreement has been in effect for not less than eight (8) consecutive months." - [redacted] The contract also provides on page 9, XII "that no agent or employee is authorized to vary, add to or change the Agreement."

The purpose and intent of the printed "Pregnancy Provisions" are to penalize those who exercise their constitutional right to bear a child, to chill and deter them in the exercise of that right and the practice of their religion, to deny them equal rights with those who have abortions and with men.

On March 4, 1971, the Pennsylvania Insurance Commissioner himself suggested to Blue Cross that maternity benefits be excluded from coverage, as the District Court noted in its opinion (A-14). On June 5, 1972 the Pennsylvania Abortion Law Commission (appointed by Governor Shapp and therefore a state agency) on page 86 and 87 of its report focused on and outlined the discriminatory practices set forth in this Petition and asked the Insurance Commissioner to take "immediate action" against Blue Cross and Blue Shield to end the practices. Again on June 22, 1972, a letter was sent to the Insurance Commissioner setting forth page 86 and 87 of the Abortion Law Commissions' Report and again asking the Insurance Commissioner to take immediate action (Exhibit "B" of Plaintiffs' Complaint). In his reply of July 18, 1972 he said he was "studying" the recommendations (page 4-hearing of June 13, 1975). He issued regulations advising insurance companies that it need not report restrictions on pregnancy coverage.

When subscribers wrote to Blue Cross and Blue Shield complaining of the discriminatory practice of granting extensive benefits for termination of pregnancy by abortion and denying these benefits for termination of pregnancy

by live birth, the Insurance Commissioner conspired with Blue Cross and Blue Shield to avoid the consumer complaints and advised them to make no answer to the consumers because it would only stir up troubled waters. Blue Shield then conspired with Blue Cross of Western Pennsylvania to coordinate their replies (T 1 to 4 - Plaintiffs' Appendix in Third Circuit and Stipulation of Facts, paragraph 27).

The Insurance Commissioner appointed a Task Force to Study Women's Insurance Problems and according to its report, even with pregnancy included, women used almost one-third (1/3) less hospitalization days per year than men. The average length of hospital stay for males is nine (9) days and for women 6.7 days. (Deposition of Mary Ellen Jeffers, Notes of Testimony 20, 21, 23 and Report of Insurance Commission Task Force page 14 and 15). Hence, women pay three and one half (3-1/2) times more and get almost one-third (1/3) less than men. This is the exact opposite of the situations in Geduldig v. Aiello, 417 U.S. 484, 94 S.Ct. 2485 and General Electric v. Gilbert, U.S. , 97 S.Ct. 401. The latter cases did not involve discrimination or hospitalization coverage. Those cases involved disability coverage where women took out more than they put in.

CONSTITUTIONAL PROVISIONS, STATUTES & ADMINISTRATIVE REGULATIONS INVOLVED

1. United States Constitution
   (a) First Amendment- free exercise of religion clause
   (b) Ninth Amendment - right to privacy
   (c) Fourteenth Amendment - equal protection & due process clauses

2. Civil Rights Acts - 42 U.S.C. §1983 & §1985 (3)

3. Pennsylvania Constitution -Equal Rights Amendment - Article 27

4. Pennsylvania Statutes:
   Act of June 21,1937,P.L. 1948, 40 P.S. 1402
   Act of November 15, 1972 P.L.1063, No.211, §6303, 40 P.S. 6303(a)
   Act of August 24, 1951, P.L. 1304, Local Health Administration Law, 16 P.S. §12001
   Act of May 17, 1921, P.L. 682, 40 P.S. 761

5. Pennsylvania Insurance Department Regulations:
   Pennsylvania Bulletin, January 12, 1974, V.4, No,2
   Pennsylvania Bulletin, January 19, 1974, V.4, No. 3

Reasons for Granting the Writ

1. The Court of Appeals for the Third Circuit and the United States District Court for the Eastern District of Pennsylvania have decided important questions of federal law which have not been, but should be decided by this court; namely:

(a) whether 42 U.S. 1985(3) reaches a conspiracy to deny a person or persons of their constitutional or civil rights or is limited merely to a "class" as held below;

(b) whether women and subscribers who choose to have a live child rather than an abortion and who cannot have an abortion for religious reasons constitute a class within the meaning of §1985(3) so that they cannot be denied equal protection of the laws, freedom of religion and right to privacy. The courts below held they did not constitute a "class: and that §1985(3) reaches only classes;

(c) whether a Complaint alleging a violation of §1985(3) must be dismissed for failure to state a cause of action because it did not use the words "invidiously discriminatory animus".

The decision is in conflict with Estelle v. Gamble, U.S. ,97 S.Ct. 546; Cooper v. Pate, 378 U.S.546, 84 S. Ct.1733; Griffin v. Breckenridge, 403 U. S.88, 91 S.Ct. 1790.

In order to dismiss the Complaint for Failure to State a Cause of Action all allegations of the Complaint must be taken as true. Cooper v. Pate, 378 U.S. 546,84 S.Ct.1733, Estelle v. Gamble,

___U.S.___, 97 S.Ct.285(1976).

Paragraph 11 of the Plaintiffs' Complaint states that the action is brought by the plaintiffs and the class they represent to secure the protection and redress deprivation of rights secured by (b) The civil Rights Acts of 1871,42 U.S. 1983 and 1985. In paragraph 11 (c) to (h) inclusive we cite the various provisions of the Constitution involved.

The Complaint also states in paragraphs 20, 22, 23, 25 and 26:

20. The Plaintiffs are being discriminated against in their civil rights to bear children, and for their religious beliefs. This constitutes a state policy of favoring death over life.

22. Defendants, under color of State Law, State regulations, custom, and usage, are subjecting and causing the Plaintiffs and the class they represent to be subjected to the deprivation of the rights, privileges and immunities secured by Constitutions and law. Defendant, Herbert Dennenberg, Insurance Commissioner, was requested on June 5, and June 22, 1972 to take action to end the discriminatory practices of the Defendants. Attached hereto and hereby incorporated is Exhibit B which is a letter to the Commissioner which he acknowledged receiving.

23. The Defendants have agreed and conspired with each other for the purpose of depriving the Plaintiffs and the class they represent of equal pro-

tection of the laws and of equal privileges and immunities and for the purpose of hindering the constituted authorities from giving and securing to the Plaintiffs and the class they represent equal protection of the law, and Plaintiffs and the class they represent have been injured in both person and property and deprived of having and exercising the rights and privileges of a citizen.

25. The Plaintiffs and the class they represent are denied their rights under the Equal Rights Amendment to the Pennsylvania Constitution, Article I, Section §27, and discriminated against in the exercise of those rights as well as the Fourteenth Amendment to the Federal Constitutuion, because the State of Pennsylvania through its Insurance Commissioner and Secretary of Health license the other defendants and approve contracts which penalize women who have children for a condition peculiar to their sex while there are no provisions in the contract penalizing men for conditions peculiar to their sex. By discriminating against subscribers who terminate their pregnancies by live births and denying their benefits as set forth in paragraph 16,17 and 18 which are hereby incorporated by reference, and in approving such discriminatory provisions, while granting full payment, benefits, and coverage to subscribers who terminate pregnancies by abortions, the Defendants force, coerce, intimidate, inveigle and induce subscribers to have abortions, and to deny their freedom of choice, conscience and religion and their right to procreate. The action and conduct of the Defendants is an unconstitutional use of the devices of economic sanctions and economic benefits.

26. In addition to their individual claim, plaintiffs bring this suit as a class action pursuant to Rules 23 (a) and (b) of the Federal Rules of Civil Procedure on behalf of all (a) females, whether single, married, widowed, or divorced, who have been or will be in the future be denied payment in indemnity for hospital and medical bills or who have been or will be discriminated against in obtaining maternity or pregnancy benefits because they have given or will give birth to live children instead of obtaining abortions, and of (b) all subscribers and future subscribers who are, have been, and will be forced to pay higher premiums to cover and pay for the pregnancy benefits, including hospital and medical care, for those who obtain abortions, while those subscribers who elect to terminate their pregnancies by live births are deprived of and denied the same benefits and are penalized by the Defendants, their contracts and subscription agreements, and the State of Pennsylvania in exercising their constitutional rights to have children, to freedom of choice, to procreate, and their constitutional rights to privacy."

All of the above allegations of the Complaint must be taken as true on a motion to dismiss the Complaint for failure to state a cause of action. Therefore, it must be taken as true that defendants conspired with each other for the very "purpose" (paragraph 23) of denying to the plaintiffs and the class they represent equal protection of the laws etc. denying them the same rights given to men and to those who have abortions, denying them freedom of choice, conscience and religion and their right to procreate (paragraph 25)

and that defendants force, coerce, intimidate, enveigle and induce subcribers to have abortions (paragraph 25).

We submit that the Complaint clearly states that defendants conspire for the purpose of denying the plaintiffs their constitutional right to procreate and to freely exercise their religion. The Complaint sets forth an invidiously discriminatory animus. We submit that there is no requirement that we use the very words "invidiously discriminatory animus" in the Complaint and that Griffin v. Breckenridge, 403 U.S. 88, 91 S.Ct. 1790 makes no such requirement.

Indeed none of the defendants in their motions to dismiss ever even averred that plaintiffs' complaint did not sufficiently state a conspiracy under 1985(3) or that plaintiffs had not averred an invidious discriminatory animus. The defendants did not cite Griffin v. Breckenridge, supra. In their motions to dismiss, defendants alleged that there was not state action under 1983.

The lower court also states incorrectly in footnote 14 that plaintiffs' brief never mentions 1985. The lower court, in its various Orders, designated the issues on which briefs were to be filed. Plaintiffs complied with the court's order. On May 12, 1974 and June 16, 1974 the court confined discovery and briefs to the issue of "State Action". The court and defendants averred that State Action was a "threshold" issue and defendants should not be required to answer extensive interrogatories until that matter was first determined. By

Order of June 16, 1975 the court closed discovery on July 16, 1975. At the hearing of July 30, 1975, the court ordered further briefs on State Action and for the first time, on Conspiracy under 1985, without permitting discovery to be repopened. On September 8, 1975 plaintiffs hand-delivered to the court two copies of their briefs on State Action under 1983 and Conspiracy under 1985. The record shows the brief was filed.

While plaintiffs were permitted no discovery on the conspiracy issue, the evidence presented on state action also established a conspiracy among Blue Cross, Blue Shield and the Insurance Commissioner and Department. However, plaintiffs should have been permitted discovery on the 1985 issues.

In paragraph 1, 2, 5 and 13 to 20 inclusive, the Complaint sets forth the discriminatory acts done in furtherance of the conspiracy. The Agreement and Certificate and Group number referred to in paragraphs 1 and 2 are a single contract and agreement with Blue Cross and Blue Shield joined in the contract on the one part and the plaintiffs being subscribers on the other part. Each agreement is a single document prepared and printed jointly by Blue Cross and Blue Shield who share the same group number and certificate number.

42 U.S. 1985(3) covers "any person or class of persons". The courts below erred in deciding it covered only classes of persons and that complaint must set forth a clearly discernible class.

However, the Complaint did set forth

a clearly discernible class. In paragraph 26 the Complaint set forth the class and classes.

The plaintiffs also filed a Motion for Class Action Designation and set forth the various classes and alternative classes.

The limits of the class depend ultimately on which constitutional right the court holds is violated.

In the present case, the pregnancy provision is merely a pretext designed to effect invidious discrimination against women who have live birth and in favor of women who have abortions and men. They are only enforced against women who have live birth.

2. The Court of Appeals for the Third Circuit and the District Court erroneously held that plaintiffs' claims were barred by Geduldig v. Aiello, 417 U.S. 484, 94 S.Ct. 2485, whereas the instant case involves religious as well as sex discrimination, and involves hospitalization benefits where women must pay three and a half times more premiums than men pay, and obtain almost one-third less hospital days even with pregnancy included. The opposite was true in Geduldig which involved disability benefits. The state in Geduldig barred all claims for normal pregnancy and did not discriminate against live birth and in favor of abortion.

In Geduldig v. Aiello, 417 U.S. 484, the state did not discriminate between abortion and live birth. The issue then was long term disability where men con-

tributed more money and received fewer benefits while the opposite is true here.

The lower court states that the plaintiffs' claims on sex discrimination are barred by Geduldig. We do not agree. First, in the California disability insurance system under consideration in Geduldig , the state refused disability benefits for both voluntary abortion and normal childbirth. There the state permitted disability benefits only for an abnormal and involuntary complication of pregnancy such as puerperal infection, eclampsia, ceasarian section, ectopic pregnancy and toxemia, etc. See Geduldig footnote 15, §2626.2 (a) and (b).

Secondly, Geduldig, supra, involved disability benefits and the integrity of the fund while the instant case involves immediate necessary hospital and medical treatment for childbirth.

The issue of providing long term disability benefits in Geduldig is quite different in results from the issue of providing hospital and medical bills. The Supreme Court observed in note 21, "women contribute about 28% of the total disability insurance and receive back about 38% in benefits". However, the exact opposite is true where the hospital and medical expenses are covered. Women's claims for hospitalization and medical expenses, even with childbirth included are almost one-third less than those of men. (Deposition of Mary Ellen Jeffers - p. 23 and Report of Insurance Commission Task Force p. 14 and 15). Hence, here women pay higher premiums and get fewer benefits than men. Men engage in more dangerous activities than women whether it be contact

sports, bar room brawls, or climbing ladders to repair their homes. They are involved in far more injuries, falls, stabbings and shootings than women. Therefore, their claims for hospital and medical expenses are higher.

In insurance for hospitalization women pay more and get less. It is unfair to exclude their claims for pregnancy under these circumstances.

Similarly, in General Electric v. Gilbert, ____U.S.___97 S.Ct. 401, the issue of religious discrimination was not involved. The employer did not discriminate on the basis of how the pregnancy terminated- whether abortion or live birth. In the instant case, the pregnancy provision is merely a pretext designed to effect invidious discrimination against women who have live birth.

Thirdly, in Pennsylvania providing health care is a sovereign function. Health Administration Act, 16 P.S. 12001 §2. The legislature has declared Blue Cross and Blue Shield necessary for the physical and mental health of the Commonwealth,40 P.S. 6303 and 1402.

Providing disability benefits is not a state function. Hospitalization for acute medical problems is far different from disability. In Geduldig and Gilbert, only disability is involved.

3. The Third Circuit Court of Appeals and the District Court have decided a federal question in a way which conflicts with Jackson v. Metropolitan Edison, 419 U.S. 345, 95 S.Ct. 449; Burton v.

Wilmington Parking Authority, 365 U. S. 715, Evans v. Newton, 382 U.S. 296, and Cleveland Board of Education v. La Fleur, 414 U.S. 632, 94 S.Ct. 791.

First, Jackson involved a privately owned profit-making business corporation subject to the same laws to which all public utilities are subject and it was engaging in a practice in which other profit-making corporations in the same business are permitted to engage. Private insurance companies are not permitted to engage in discrimination between persons of the same class in rates, benefits, or premiums, etc. Pregnant women are in the same class. Moreover, plaintiffs' employers paid the family rate premium for them, the highest rate, even though defendants arbitrarily listed plaintiffs in a Husband-Wife (no maternity) category. Private insurance companies could not even have such a category and charge the same rate as Husband-Wife (with maternity) or Family Agreement. The same rates require the same benefits where private insurance companies are involved. Indeed, private insurance companies are expressly prohibited from any discrimination whatsoever by Pennsylvania Statute 40 P.S. 761. However, Blue Cross and Blue Shield are exempt from all insurance laws, 40 P.S. 6103(a) & 1402. Private insurance companies do not discriminate on the basis of religion. They do not discriminate between termination of pregnancies by live birth and termination by abortion.

Second, the defendant in Jackson did not have seven public directors on its board of directors, nor did the Public Utilities Commission ever require it to amend its by-laws to provide for public

directors. On March 5, 1971, Insurance Commissioner Herbert S. Denenberg wrote to Blue Cross advising it that its by-laws must be amended to provide for public directors appointed by the Governor, etc. (Stipulation of Facts - par. 13, Exhibit K - Record). Blue Cross amended its by-laws in accordance with the direction of the Insurance Commissioner. A copy of the by-law if filed with the record as Exhibit L to Stipulation of Facts - par. 14. Since 1971 Blue Cross has had on its board of directors members nominated by the following governing officials or bodies: Governor, Mayor of Philadelphia, President of City Council, and Commissioners of Bucks, Chester, Delaware & Montgomery Counties. There are seven public directors on the Blue Cross board of directors. Blue Cross and Blue Shield are quasi-public, tax-exempt, non-profit corporations, subsidized by the state through their tax exempt status. As stated previously, they are engaged in a joint venture with the Commonwealth.

Third, the legislature has declared Blue Cross and Blue Shield necessary for the physical and mental health of the residents of the Commonwealth and it was necessary that provision be made by the State for such medical services, 40 P.S. 6303 & 1402. The Supreme Court noted in Jackson that Pennsylvania courts have rejected the contention that furnishing utilities services are either State or municipal functions. However, the Pennsylvania legislature has held that it is the duty of this State to provide for the health and medical services of its residents. The Local Health Administration Law of August 24, 1951, P.L. 1304, 16 P.S. 12001, §2 states:

"The general Assembly of this Commonwealth has determined and hereby declares as a matter of legislative finding that: (a) The protection and promotion of the health of the people in the furtherance of human well-being, industrial and agricultural productivity and the national security is one of the highest duties of the Commonwealth..."

The non-profit hospital and health plans are the vehicles it developed to provide the service and to which it delegated its duty. It has always been the sovereign function of the state to provide for the health, safety and welfare of its people. Hence, we are dealing here with sovereign function. In public function cases the courts have found state action. Evans v. Newton, 382 U.S. 296.

Fourth, the defendant in Jackson was acting in accordance and not in violation of the provision of its tariff, and the provision had never been the subject of a hearing or other scrutiny by the Public Utilities Commission. However, in the present case, the defendants are acting in violation of their contracts by enforcing their pregnancy provisions only against subscribers whose pregnancies are terminated by live birth and "waiving" them for subscribers whose pregnancies are terminated by abortion. Moreover, Commissioner Denenberg himself stated in his letter of November 6, 1973 that it is unlawful to tax subscriber funds for services not included in their contract coverage and for this reason he would not permit Blue Cross to include a "cost plus" factor in its contracts with hospitals (P.12 - Depositions of Bruce Taylor).

The evidence in this case shows that the Insurance Commissioner was studying maternity coverage as early as March 5, 1971 when he recommended to all five Blue Cross Plans that it be excluded from coverage.

In Burton v. Wilmington Parking Authority, 365 U.S. 715, 725, 6 L. Ed. 2d 45, 52 (1961) the court held that the failure of the state to exercise authority available to it to prevent the discrimination placed the power and prestige of the state behind the discrimination and constituted action by the state . The present case presents far clearer state action, in that the state has acted affirmatively to place the power and prestige of the state behind discrimination against women and discrimination based on religion giving its full approval and authority to that discrimination.

The Court of Appeals below cited Broderick et al. v. Associated Hospital Services of Philadelphia et al., 536 F2d 1 (1976) as controlling our case. Except for the fact that Broderick sued Blue Cross and Blue Shield for its discriminatory practices against women, the case was nothing like ours.

When Broderick stated her suit she relied on the holding in Stern v. Massachusetts Indemnity and Life Insurance Company, 365 F. Supp. 433 (E.D. Pa 1973), which equated state regulation with state action. Broderick did not prove, as we did, that the state had focused upon and investigated the very discriminatory practice complained of. In Broderick case she relied on state regulation. She proved

until 1972 Blue Cross allowed married men to enroll under single coverage without enrolling their wives but married women could not obtain coverage at all unless they enrolled their husbands and paid at least a double premium. In that case Blue Cross averred that the Insurance Department had not passed upon its enrolling procedure and the plaintiff failed to prove that it had (shortly after suit was instituted Blue Cross amended its enrolling procedure to eliminate the discrimination between married men and women).

In our case it is admitted that we proved that the state had focused on and investigated the practices complained of since 1971. Our record is replete with proof of the sneaky involvement of the insurance commissioner who in his "Mini-guide to Women's Insurance Rights" publicly proclaimed that "Women should expect full coverage for all pregnancy services. They should not be satisfied with an insurance policy that singles out maternity and pregnancy for special limitations or for extra premiums" while he was privately conferring with officials of Blue Cross and Blue Shield to remove "live birth" benefits from their coverage altogether (Letter of March 4, 1971 - A 14 of District Court Opinion).

Where it is the Insurance Commissioner of Pennsylvania who conspires with the defendants we have both state action under 1983 and a conspiracy under 1985 (3).

4. The Third Circuit Court of Appeals has rendered a decision which conflicts

with the decision of the Sixth Circuit Court of Appeals in Meredith v. Allen County War Memorial Hospital, 397 F. 2d 33.

The Sixth Circuit held that even though the defendant was a private hospital, the existence of members appointed by the public on its commission, and the receipt of government funds imbued its conduct with state action. Blue Cross and Blue Shield receive public funds through tax exemption and their membership in the Philadelphia Health Management Corporation, created by the Federal Government.

5. The pregnancy provisions of the Blue Cross and Blue Shield contracts are mere pretexts designed to effect invidious discrimination against women who terminate their pregnancies by live birth and in favor of women who terminated their pregnancies by abortion and in favor of men. Gilbert v. California, U.S. 97 S.Ct. 401.

All pregnancies must terminate sometime and in some manner. The Blue Cross/Blue Shield pregnancy provisions are only enforced against women who terminate pregnancies by live birth and are not enforced in any other type of termination of pregnancy.

Women, even with pregnancy included, use almost one-third less hospital days than men. Men receive far more than they contribute. Why should women have to pay 3-1/2 times more for pregnancy coverage.

Since the pregnancy provisions are enforced and required only of

women who have live birth they are a fraudulent pretext to affect an invidious discrimination on the basis of religion and sex. General Electric v. Gilbert, supra.

Conclusion

For all of the foregoing reasons, this petition should be granted.

Respectfully submitted,

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AFFIDAVIT OF SERVICE

COMMONWEALTH OF PENNSYLVANIA
SS
COUNTY OF PHILADELPHIA

SARA DUFFY,ESQUIRE, being duly sworn according to law, deposes and states that she is a partner in the law firm of Duffy and Duffy, counsel of record for the petitioners in the captioned matter, and that on June 13, 1977 she served copies of the Petition for Writ of Certiorari herein on Raymond T. Cullen, Jr., Esq., 123 S. Broad Street, Philadelphia, PA, attorney for Blue Cross and Morris R. Brooke, Esq., 1100 Philadelphia National Bank Building, Broad and Chestnut Streets, Philadelphia, PA, attorney for Blue Shield by handing copies to the receptionists at their offices, and on Kathleen H. Larkin, Deputy Attorney General, Capitol Annex Building, Civil Litigation Division, Harrisburg, PA, attorney for the Commonwealth defendants by certified mail, receipt number 739199.

Sara Duffy
SARA DUFFY

Sworn to and subscribed before me this 13 day of June , 1977.

Eileen Kreszswick
Notary Public
MY COMMISSION EXPIRES:
EILEEN KRESZSWICK, NOTARY PUBLIC
PHILADELPHIA, PHILADELPHIA COUNTY
MY COMMISSION EXPIRES JAN. 27, 1981
Member, Pennsylvania Association of Notaries

TABLE OF CASES CITED

Broderick v. Associated Hospital Service et al., 536 F. 2d 1
Burton v. Wilmington Parking Authority, 365 U.S. 715
Cleveland Board of Education v. LaFleur, 414 U.S. 632
Cooper v. Pate, 378 U.S. 546, 84 S.Ct. 1733
Estelle v. Gamble, U.S. , 84 S.Ct. 546
Evans v. Newton, 382 U.S. 296
Geduldig v. Aiello, 417 U.S. 484, 94 S.Ct. 2485
General Electric v. Gilbert, 97 S.Ct. 401
Griffin v. Breckenridge, 403 U.S. 88, 91 S. Ct. 1790
Jackson v. Metropolitan Edison, 419 U.S. 345, 95 S. Ct. 449
Meredith v. Allen County War Memorial Hospital, 397 F. 2d 33
Stern v. Massachussetts Indemnity & Life Insurance Co., 365 F. Supp. 433

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 76-1936

HELEN MC CAFFREY JACKSON, et al., Appellants

v.

ASSOCIATED HOSPITAL OF PHILADELPHIA, etc., et al.

SUR PETITION FOR REHEARING

Present: SEITZ, Chief Judge, and VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, WEIS and GARTH, Circuit Judges, and MC CUNE, District Judge.*

The petition for rehearing filed by

Appellants

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

Dated: March 15, 1977

Judge

* Judge Hunter did not participate in the consideration of this matter.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 76-1936

HELEN McCAFFREY JACKSON and ANDREW J. JACKSON, individually and in their own right and ANDREW McCAFFREY JACKSON, a minor by his parents and guardians, HELEN McCAFFREY JACKSON and ANDREW J. JACKSON, 2132 Grant Avenue, Philadelphia, Pennsylvania

and

MARY ELLEN JEFFERS, individually and in her own right, and as parent and guardian of ANNE JEFFERS, THERESA JEFFERS, MARY ELLEN JEFFERS, and ELAINE JEFFERS, and ANNE JEFFERS, individually and in her own right, 123 School Lane, Springfield, Pennsylvania

and

LYNN VARRICCHIO, 127 Davis Street, Youngsville, Pennsylvania

v.

ASSOCIATED HOSPITAL OF PHILADELPHIA a/k/a BLUE CROSS OF GREATER PHILADELPHIA (a corporation), 1333 Chestnut Street, Philadelphia, Pennsylvania

and

MEDICAL SERVICES ASSOCIATION OF PENNSYLVANIA a/k/a PENNSYLVANIA BLUE SHIELD, 1333 Chestnut Street, Philadelphia, Pennsylvania

and

WILLIAM SHEPPERD, individually and as INSURANCE COMMISSIONER OF THE COMMONWEALTH OF PENNSYLVANIA, 1001 City Line Avenue, Philadelphia, Pennsylvania

and

1701 State Office Building, 1440 Spring Garden Street, Philadelphia, Pennsylvania

and

J. FINTON SPELLER, M.D., individually and as SECRETARY OF HEALTH OF THE COMMONWEALTH OF PENNSYLVANIA, 245 N. Broad Street, Philadelphia, Pennsylvania

HELEN McCAFFREY JACKSON and ANDREW J. JACKSON, individually and in their own right and as parents and guardians of ANDREW McCAFFREY JACKSON and MARY ELLEN JEFFERS, individually and in her own right and as parent and guardian of THERESE JEFFERS, MARY ELLEN JEFFERS and ELAINE JEFFERS, minors, and ANNE JEFFERS,

Appellants

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil No. 73-2908)

Argued February 15, 1977
Before: ALDISERT and GARTH, Circuit Judges,
and McCUNE, District Judge.

JUDGMENT ORDER

After consideration of all contentions raised by appellants, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed. See Broderick v. Associated Hospital Service, 536 F.2d 1 (3d Cir. 1976); Griffin v. Breckenridge, 403 U.S. 88 (1971), and Geduldig v. Aiello, 417 U.S. 484 (1974).

Costs taxed against appellants.

BY THE COURT,

Circuit Judge

Attest:

Thomas F. Quinn, Clerk

DATED: FEB 15 1977

* Honorable Barron P. McCune of the United States District Court for the Western District of Pennsylvania, sitting by designation.

Certified as a true copy and issued in lieu of a formal mandate on March 23, 1977.

Test: THOMAS F. QUINN
Clerk, United States Court of Appeals
for the Third Circuit

COPY

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

HELEN McCAFFREY JACKSON and ANDREW J. JACKSON, individually and in their own right and ANDREW McCAFFREY JACKSON, a minor by his parents and guardians, HELEN McCAFFREY JACKSON and ANDREW J. JACKSON, et al	:	CIVIL ACTION
vs.	:	
ASSOCIATED HOSPITAL OF PHILADELPHIA a/k/a BLUE CROSS OF GREATER PHILADELPHIA, et al.	:	NO. 73-2908

OPINION AND ORDER

HUYETT, J. MAY 11, 1976

Plaintiffs in this action are various subscribers, and in some cases their dependents, to the hospital and medical plans of defendants Blue Cross of Greater Philadelphia (Blue Cross) and Medical Service Association of Pennsylvania (Blue Shield).[1] Invoking 42 U.S.C. §§1981, 1983, and 1985 and the Pennsylvania Constitution, plaintiffs challenge the constitutionality of some of the Blue Cross and Blue shield maternity benefit plans and seek declaratory and injunctive relief[2] and damages against defendant health plans as well as against state defendants Herbert S. Dennenberg, former Pennsylvania Insurance Commissioner, and J. Finton Speller, former Secretary of Health of the Commonwealth of Pennsylvania.[3] Although this action has proceeded slowly due, in no small part, to a lack of clarity in some of plaintiffs' pleadings and memoranda of law, the advent of Jackson v. Metropolitan Edison Co. , 419 U.S. 345 (1974), somethin over a year ago signaled clearly that the primary jurisdictional base for plaintiffs' case, 42 U.S.C. §1983 was shaky. We therefore set up a discovery period to be devoted to gathering evidence, documentary and otherwise, to aid us in determining the presence of state action under §1983. Upon completion of discovery we held a hearing on the issue and the parties then submitted post-hearing memoranda of law which were to treat

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1 Blue Cross is a "corporation not-for-profit organized and existing to establish, maintain and operate a nonprofit hospital plan whereby hospitalization and related health benefits are provided to subscribers to such plan." Answer defendant Blue Cross, ¶4. Blue Shield is "a Pennsylvania non-profit corporation... which provides medical insurance." Answer of defendant Blue Shield. ¶5

2 Plaintiffs have asked, pursuant to 28 U.S.C. §§2281 and 2284, that we convene a three-judge court in this action. Although plaintiffs have never articulated a recognizable ground for our so doing, we need not contend with this matter since we find it necessary to dismiss the case on general jurisdictional grounds. Even in cases in which the relief sought is more obviously that contemplated by §§2281 and 2284, a single District Court Judge has the power to dismiss a Complaint for want of general subject matter jurisdiction. Gonzalez v. Employees Credit Union, 419 U.S. 90, 97 n.14 (1974).

3 The granting of injunctive relief in this case would, of course, require the addition as defendants of William Sheppard, the current Insurance Commissioner of Pennsylvania, and Dr. Leonard Bachman, the current Secretary of Health. In view of our disposition here, however, the problem is academic.

APPENDIX A

the issue of jurisdiction both under §1983 and under §1985(3).[4] Having considered at length the evidence presented and arguments of the parties, we find we must dismiss plaintiffs' complaint for lack of jurisdiction.

As we read plaintiffs' constitutional claim, its main thrust is that all defendants, in conspiracy with one another, have impermissibly infringed upon plaintiffs' religious exercise and their right to bear children by placing certain restrictions on Blue Cross and Blue Shield maternity benefit plans. Although unclear whether or not all maternity plans offered by Blue Cross and Blue Shield impose these restrictions, it is apparent from the documentary evidence submitted that a good many do impose them. The tow restrictions most complained of are an eight-month waiting period from the effective date of the insurance contract for eligibility for maternity benefits[5] and an increased premium to

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4 We saw no reason to require briefing on the issue of jurisdiction under 42 U.S.C. §1981 since §1981 is clearly an inappropriate jurisdictional base in this action, While controversy exists over which races may seek relief under §1981, see, e.g., Spiess v. C. Itah & Co., 44 L.W. 2379 (S.D. Tex. Jan. 29, 1976), most courts restrict the play of this statute to the racial arena. See Georgia v. Rachel, 384 U.S. 780, 792 (1966). A few courts have extended its reach to claims based on alienage. Presseisen v. Swarthmore College, Civil Action No. 74-1313 (E.D.Pa. March 25, 1976) (Bechtle, J.) and cases cited therein. Plaintiffs here make no claim founded on either race or alienage.

5 Although the language may differ from plan to plan, the eight-month waiting period to qualify for benefits for normal childbirth remains the same. As an example, Section III of defendant Blue Cross's Co-Pay Comprehensive Plan, Form HC 5-B, reads in part:

> Hospitalization benefits...shall be available only to an Applicant Subscriber or spouse of Applicant enrolled under a Family Agreement in cases of pregnancy or any disease, injury or condition arising therefrom, provided, however that in either case, such Family Agreement has been in effect for not less than eight (8) consecutive months.

BEST COPY AVAILABLE

obtain maternity benefits.[6] Plaintiff Helen Jackson, for example, was denied Blue Cross maternity benefits on the basis of the eight-month restriction. In raising their constitutional challenge, plaintiffs focus particularly on the comparison between Blue Cross and Blue Shield coverage of the medical expenses associated with abortion, specifically elective abortion, and those associated with normal childbirth. Defendant health plans admittedly treat abortion as a surgical rather than an obstetrical procedure and therefore do not impose on abortion c-verage the restrictions imposed on maternity coverage. This distinction, plaintiffs contend supported by the state, amounts to an unconstitutional "state policy favoring death over life." Plaintiffs' principal claim, then, appears to be a due process attack on arbitrary governmental infringement upon first amendment rights to free religious exercise and the right to privacy. In addition to this claim, however, plaintiffs raise, without concentrating upon them, two contentions apparently grounded in the equal protection clause of the Fourteenth Amendment. Plaintiffs allege that defendant health plans discriminate both against women in general and against women, the former by penalizing them for a condition peculiar to their sex and the latter either by denying them access to maternity benefits or

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6 Although the record does not determine how many of defendant insurers' plans require an increased premium for coverage for normal childbirth, defendants do not deny that some of them do.

by requiring them to pay a substantial extra premium to obtain benefits. In opposing plaintiffs' claims defendants raise various defenses going both to standing of the various plaintiffs and to the merits of their claims. We will not reach these issues, however, since we hold that, as a Federal Court, we lack the jurisdictional power to entertain plaintiffs' suit in the first instance.[7]

Section 1983 of Title 42 reads:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Plaintiffs' successful invocation of §1983, and its jurisdictional counterpart 28 U.S.C. §1343(3), depends on our finding that the involvement of the Commonwealth of Pennsylvania, through its Insurance Department, in the business conduct of defendants Blue Cross and Blue Shield rises to the level of state action. If the Commonwealth's involvement does not produce state action, then the insurance practices complained of are purely private activities and reachable, if at all, not through §1983 buth through §1985(3).

In making a finding on state action, most especially

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[7] In dismissing this action for lack of jurisdiction, we also bypass a decision on plaintiffs' motion for class determination. Plaintiffs have never clearly pleaded the precise class outlines they wish us to endorse. We find, for instance, tow classes identified in the Complaint and five in the Motion for class action determination. Nor do plaintiffs designate which of the named plaintiffs represent any of these classes. The confusion having persisted to date, we will not now attempt to unravel it.

in this case in which the state involvement, whatever its level, takes the form of state regulation of private, non-profit insurers, our Bible must be Jackson v. Metropolitan Edison Co., 419 U.S.345 (1974). In Jackson plaintiff filed suit under §1983 seeking injunctive relief and damages against defendant, a privately owned and operated utility, for terminating her electrical service without notice or a hearing. She further alleged that the degree of state involvement in defendant's operation converted defendant's activities into state action. The Court, in a 6-3 decision, held that

> the State of Pennsylvania is not sufficiently connected with respondent's action in terminating petitioner's service so as to make respondent's conduct in so doing attributable to the State for the purposes of the Fourteenth Amendment

419 U.S. at 358-59. Justice Rehnquist, writing for the majority, structures his analysis by first setting out a broad standard for determining when the conduct of a regulated enterprise amounts to state action and then considering, as possibly relevant to this standard, three areas of contiguity between the enterprise and the State. In making our finding here, we, in turn, will structure our analysis on that of the Jackson Court.

The Court begins its analysis by defining the focal consideration in assessing the presence vel non of state action under §1983 when the alleged state actor is a regulated business:

> The mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment... Nor does the fact that the regulation is extensive and detailed, as in the case of most public utilities do so...(T)he inquiry must be whether there is a sufficiently close nexus between the

> State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself.

Id. at 350-51 (citations omitted). Defendants Blue Cross and Blue Shield, as non-profit providers of health insurance, are unquestionably subject to state regulation. Since February 1973, they have both been covered by a separate statutory scheme applicable to non-profit insurers, 40 P.S. §6101 et seq. This determination, however, as the Jackson Court points out, far from being dispositive, is only the jumping off point for analysis.

In deciding, in the context of Jackson, whether or not there existed "a sufficiently close nexus between the State and the challenged action of the regulated activity so that the action of the latter may be fairly treated as that of the State itself," the Court considers, as the first of three areas of possibly relevant inquiry, the status of Metropolitan Edison as a state-created monopoly. Although the Court disputes Metropolitan's monopoly status, it goes on to conclude:

> But assuming that [the public utility had a monopoly status], this fact is not determinative in considering whether Metropolitan's termination of service to petitioner was "state action" for purposes of the Fourteenth Amendment... In [Public Utilities Commission v. Pollak, 343 U.S. 451 (1952), and Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972)], there was insufficient relationship between the challenged actions of the entities involved and their monopoly status. There is no indication of any greater connection here.

Id. at 351-52. The crucial point here for the purposes of our analysis is that Blue Cross and Blue Shield, althougth tax-exempt,[8]

[8] 40 P.S. §6103(b) and §6307(b).

do not even arguably enjoy a protected monopoly. They compete with the commercial insurance market. In fact according to the deposition of Thomas Chepel, a rate analyst for the Pennsylvania Insurance Department:

> When you are talking about comparing a Blue Cross and Blue Shield non-group subscriber contract with an individual accident and health insurance policy written by a commercial accident and health insurance carrier, you would find a cost difference that is significant; that being that Blue Cross and Blue Shield would provide better benefits at a more reasonable cost. When you are talking about the large group cases, the cost of Blue Cross and Blue Shield providing comparable benefits with a large commercial accident and health insurer, it can become very close. It can be very competitive.

Dep. at 54. Thus the extent to which a link between monopoly status and conduct challenged might have aided the Jackson plaintiff cannot bolster plaintiffs' argument here. The lack of monopoly status on the part of Blue Cross and Blue Shield cuts further against plaintiff's position when one notes that both Justice Douglas and Justice Marshall base their dissents, in important part, on the fact of Metropolitan's state-protected monopoly.

The Court next considers the significance of a regulated business' activity being, arguably, in the public interest:

> If we were dealing with the exercise by Metropolitan of some power delegated to it by the State which is traditionally associated with sovereignty, such as eminent domain, our case would be quite a different one... The Pennsylvania courts have rejected the contention that the furnishing of utility services are either state functions or municipal duties.

> Perhaps in recognition of the fact that the supplying of utility service is not traditionally the exclusive prerogative of the State, petitioner invites the expansion of the doctrine (that state action is present in the exercise by a private entity of powers traditionally exclusively reserved to the State) into a broad principle that all businesses "affected with the public interest" are state actors in all their actions.
>
> We decline the invitation....

Id. at 352-53 (citations omitted). Applying this reasoning to the case at hand, we find, as we did when considering the Court's position on Metropolitan's monopoly status, that plaintiffs here have an even weaker case than did plaintiff in Jackson. Certainly, if the supplying of utility service to private homes, service that assures heat and light in these homes, is not "traditionally associated with sovereignty," then the supplying of health insurance is not so associated.

The final area of inquiry under the Jackson Court's analysis is the one which, on the particular facts of this case, presents the closest question. In commenting on the import, in an examination into the presence of state action, of the state's authorizing and approving a termination procedure by approving the general tariff in which it was contained, the Court points out:

> This provision has appeared in Metropolitan's previously filed tariffs for many years and has never been the subject of a hearing or other scrutiny by the Commission.

Id. at 354. The Court then goes on, however, to discuss Public Utilities Commission v. Pollak, 343 U.S. 451 (1952), in which the Court upheld the constitutionality of a piped music system on the buses of a transit line regulated by the District of Columbia Utilities Commission. Although the Court questions whether there was an explicit finding of state action in Pollak, the Court distinguishes Pollak from Jackson in the following crucial terms:

> The District of Columbia Public Utilities Commission, on its own motion, commenced an investigation of the effects of the piped music, and after a full hearing concluded not only that Capital Transit's practices were "not inconsistent with public convenience, comfort, and safety," but also that the practice "in fact, through the creation of better will among passengers, ...tends to improve the conditions under which the public rides." Here, on the other hand, there was no such imprimatur placed on the practice of Metropolitan about which petitioner complains...Approval by a state utility commission of (a request) from a regulated utility, where the Commission has not put its own weight on the side of the proposed practice by ordering it, does not transmute a practice initiated by the utility and approved by the Commission into "state action." At most, the Commission's failure to overturn this practice amounted to no more than a determination that a Pennsylvania utility was authorized to employ such a practice if it so desired. Respondent's exercise of the choice allowed by state law where the initiative comes from it and not from the State, does not make its action in doing so "state action" for purposes of the Fourteenth Amendment.

Id. at 356-57 (citations omitted).

The primary factual difference, although, we conclude, not a viable distinction, between the action under consideration here and the Jackson case is that in the present case there has been some recent state activity focusing at least on the general

areas out of which plaintiffs' complaints arise.[9] The documents and other materials produced for the state action hearing tend to show the following state involvement in the issues raised by questions about women's insurance in general and about maternity benefits in particular. Correspondence among defendants and between the Pennsylvania Insurance Department and interest groups reveals that the Insurance Department was to some degree aware of questions about women's insurance and maternity and abortion coverage as early as 1971. The earliest statement in evidence from the Insurance Department shows the Department's concern with the subject of maternity benefits but not a concern particularly relevant to the facts of this case. In a March 4, 1971, release (Ex. V), the then Commissioner Dennenberg recommended that Blue Cross study the following question:

> Should maternity benefits (except for complications) be excluded from coverage, as such expenses are better treated by budgeting or low cost loans than insurance?

More relevant here are the 1974 activities of the Insurance Department. On January 12, 1974, a notice appeared in the Pennsylvania

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[9] Although the most relevant state activity occurred in 1974 after this Complaint was filed and jurisdiction must be determined as of the filing date, we will proceed with our analysis since this discrepancy might be correctable by a motion under Fed.R. Civ.P. 15 or perhaps by withdrawing and refiling the Complaint.

Bulletin, Vol. 4, No. 2 (Ex. A to Doc. #53), in which the Insurance Department directed insurers covered by the statutory scheme regulating commercial insurers, 40 P.S. §341 et seq., to submit to the Department all policies which made distinctions based on sex. The notice provided, however, that

> restrictions or modifications based solely on the costs or other circumstances surrounding a normal pregnancy such as an exclusion for costs of a normal pregnancy would not be reported.

Any implication raised by this provision that the Insurance Department was not concerned with maternity benefits was contradicted a week later when the following release appeared in the Pennsylvania Bulletin, Vol. 4, No. 3 (ex. B to Doc. #53):

> The Commissioner seriously questions the necessity and propriety of any discrimination on the basis of sex in insurance coverage or rates or the provision of health service benefits, including discrimination based on the occurrence of normal pregnancy.
>
> ...
>
> (a) formal request has been made for an opinion from the Attorney General on the following questions:
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> ...
>
> 3. Is discrimination on the basis of normal pregnancy prohibited by Federal or State law?
>
> ...
>
> 4. If discrimination on the basis of normal pregnancy is not necessarily prohibited by Pennsylvania or Federal law, may the Commissioner, under his existing statutory powers and for good reasons, prohibit such discrimination?

Furthermore, in March 1974 the Department issued a publication entitled a "Mini Guide to Women's Insurance Rights" (Ex. D to Doc. #53), and in June 1974 the Insurance Commissioner's Task

Force on Women's Insurance Problems issued its report and recommendations. (Ex. 2 to depositions of Paul Henning and Thomas Chepel.) Both documents challenge the maternity coverage practices complained of here.[10] Finally, in the Fall of 1974 correspondence between the Insurance Department and Blue Cross and Blue Shield (Ex. V and Y-1 to 4) discloses that at the request of the Department defendant insurers were submitting a paper examining the subject of maternity coverage. Now, somewhat over a year later, the Insurance Department still has the matter of maternity coverage under consideration; the Attorney General has not yet issued an Opinion Letter.

If we read Jackson as holding that when a state regulatory agency focuses upon and investigates particular activities of a regulated business, this focus itself may tip the balance in favor of finding state action, we could perhaps find state action in this case.[11] We do not so read Jackson, however. Although the Court in Jackson points out that the state had apparently never

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[10] Exhibit E to E-3 attached to Doc. #53 apparently represents typed copies of two pages from a 1972 Report of the Pennsylvania Abortion Law Commission in which maternity coverage practices are also challenged.

[11] We note here our agreement with Justice Douglas that the majority in Jackson appear to depart from a full balancing analysis and that their analysis is "fundamentally sequential rather than cumulative." 419 U.S. at 363. In this case, however, because of both its factual similarities to and differences from Jackson we would reach the same result whether we viewed the Jackson Court's analysis as one which balanced relevant considerations or examined them seriatim.

focused on Metropolitan's termination procedures (or lack of them), the key language of the opinion characterizing the level of state encouragement necessary to convert private into state action relates that the State in Jackson had placed

> "no. . . imprimatur . . .on the practice of Metropolitan about which petitioner complains. . . . Approval by a state utility commission of (a request) from a regulated utility, where the Commission has not put its own weight on the side of the proposed practice by ordering it, does not transmute a practice initiated by the utility and approved by the Commission into "state action."

Id. at 357. Viewing the facts of this case in light of this language, we cannot say that Pennsylvania has, either overtyly or covertly, placed its imprimatur on the insurance practices complained of. Certainly it has not "put its own weight on the side of the proposed practice by ordering it."[12] Rather it has challenged the practices and is currently investigating them. Under these circumstances and relying on Jackson, we find, at least to date, no involvement of the state in the challenged insurance activities sufficient to transform those activities into state action.

Before condluding our examination of state action, however, we feel obliged to make tow observations. First, an undeniable implication of the Court's opinion in Jackson is that the answer to the question of whether or not private conduct has been transformed into state action can change as circumstances change. In other words, although we fail to find state action

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[12] Nor has any state official "participated in the decisional process setting forth" the restrictions on maternity coverage, "the precise challenged activity'." See Magill v. Avonworth Baseball Conference, 516 F.2d 1328, 1335 (3d Cir. 1975).

under the facts of this case, a similar complaint filed subsequent to a substantial change in the state's posture on the matters raised here might compel a contrary finding on the issue of state action. Second, we do not read the Court's opinion to hold that the absence of any formal state pronouncement on a particular matter brought to its attention forever precludes a finding of state action. An inordinate delay between a state inquiry into or investigation of a practice coupled with evidence of informal or covert encouragement of a practice might give rise to a finding of state action.[13]

Finally, our finding that, under the facts of this case, state action requisite to sustain jurisdiction under 42 U.S.C. §1983 is lacking means that the conspiracy alleged here is, for jurisdictional purposes, a private one and may be challenged effectively, given plaintiffs' jurisdictional statement, only under 42 U.S.C. § 1985 (3).

Section 1985(3) of Title 42[14] reads in relevant part:

> If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws . . . the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

In determining whether or not plaintiffs' allegations of conspiracy state a cause of action under § 1985(3) and its jurisdictional counterpart, 28 U.S.C. § 1343(1), one must, of course, begin with Griffin v. Breckenridge , 403 U.S. 88 (1971), which overruled Collins v. Hardyman, 341 U.S. 651 (1951), by holding that in some situations § 1985(3) reaches wholely private conspiratorial activity. The key section of Griffin, illuminating the nature of the activity proscribed by § 1985(3) explains:

> The language requiring intent to deprive of equal protection, or equal privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' actions.

403 U.S. at 102. Based on this language most courts approach Griffin problems by deciding first whether or not a plaintiff has alleged the existence of a discernible class and of the requisite class-directed animus or hostile motive. Courts then go on, as did the Griffin Court, to identify "a source of congressional power to reach the private conspiracy alleged by the Complaint." 403 U.S. at 104.

In Griffin the Court had no difficulty in finding that plaintiffs had alleged the necessary class-based animus. The Griffin plaintiffs, a group of Blacks, alleged that defendants dragged them from their car on a public highway, beat them because defendants mistakenly believed that one of them was a civil rights worker, and intended to prevent them from exercising their first

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[13] Although the Attorney General's Opinion Letter on the issues involved here has been pending a year, we do not find this amount of time, given the complexities of the issues, an inordinate delay.

[14] Plaintiffs do not in their complaint designate subsection 3 of §1985 as the particular statutory authority they are invoking; they have cited §1985 generally. We assume from the facts as alleged that it is subsection 3 that plaintiffs rely upon. Ordinarily any doubt generated by the form of the jurisdictional allegations in the complaint would be resolved by briefing the jurisdictional issues, as the parties were requested to do in this case. Plaintiffs' brief, however, never mentions §1985.

and fifth amendment rights and from travelling freely. Nor did the Court have any difficulty in finding that congressional power to reach such a private conspiracy resided in the Thirteenth Amendment and in the constitutional right to travel, neither of which is circumscribed by the concept of state action. Under Griffin , then, a cause of action properly brought under § 1985(3) must allege the existence of a class "racial or perhaps otherwise" and the existence of a discriminatory animus or host-le motive triggering defendant's conduct. In addition, there must be a valid source of congressional power to reach the particular conspiracy alleged. The Griffin Court deliberately avoided, however, defining the limits under § 1985(3) on class characteristics and on congressional power to reach private conspiracy. And, in fact, what case law subsequent to Griffin has demonstrated most conclusively is that these questions of limitation the Court left open do not suggest obvious answers. We need not here, however, consider possible limitations on congressional power; nor need we confront any borderline determination of class composition since we find in plaintiffs' complaint appropriate allegations neither of the existence of any readily discernible class or of the invidiously discriminatory animus requisite to a §1985(3) action.

The range of possibilities for the composition of a Griffin class, was, as noted, left unresolved by the Court, Justice Stewart merely commenting in a footnote that

> (w)e need not decide, given the facts of this case, whether a conspiracy motivated by invidiously discriminatory intent other than racial bias would be actionable under the portion of § 1985(3) before us.

Id. at 102 n.9. Lower courts have, not surprisingly, approached this issue from more than one direction. Judge Merhige, in Bellamy v. Mason's Stores, Inc., 368 F. Supp. 1025, 1028 (E.D. Va. 1973), aff'd., 508 F.2d 504 (4th Cir. 1974), equates a § 1985(3) class with a class "defined by the traditional indicia of suspectness... discrete, insular, and immutable characteristics." This interpretation would appear to limit the possible classes to those based on race, national origin, and, according to Judge Merhige, sex.[15] The Court of Appeals for the Eighth Circuit, on the other hand, has expanded the class definition to include

> an identifiable body with which the particular plaintiff associated himself by some affirmative act. It need not be an oath of fealty; it need not be an initiation rite; but at least it must have an intellectual nexus which has somehow been communicated to, among, and by the members of the group.

Means v. Wilson, 522 F.2d. 833, 839-40 (8th Cir. 1975), cert. denied, 44 U.S.L.W. 3498(Mar. 9, 1976), quoting, Westberry v. Gilman Paper Co., 507 F.2d 206, 215 (5th Cir. 1975). As the Eighth Circuit notes, however, the Court of Appeals for the Fifth Circuit, en banc, withdrew the Westberry opinion, dismissing the case as moot "so that it will spawn no legal precedents." 507 F.2d at 216. In the present case, regardless of the direction from which we approach the problem, we cannot satisfactorily isolate from plaintiff's pleadings any discrete class. Although

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[15] We note here our wholehearted agreement with Judge Gibbons that

> It must be acknowledged that the appropriate standard against which a disputed gender based classification should be measured. . . does not spring from the pages of United States Reports with immediate clarity.

Vorchheimer v. School District of Philadelphia, F.2d (3d Cir. 1976) (Gibbons, J. dissenting).

women as a class are mentioned in ¶25 of the complaint and single women in ¶16, the gravamen of plaintiffs' cause of action is that the restrictions which Blue Cross and Blue Shield place on benefits for normal pregnancies adversely affect all subscribers, men or women, married or unmarried, who wish maternity benefits by infringing on their religious exercise and on their right to bear children. Any attempt to locate a discrete class is confused by the facts that some parts of the complaint allege injury to all Blue Cross and Blue Shield subscribers, that two of the named plaintiffs are male, and that plaintiffs do not identify any particular religious group whose rights are threatened. In short, we find here no class definite enough to meet the test of Griffin.

Plaintiffs' only remotely colorable class theory, that women as a class are invidiously discriminated against because of a condition peculiar to their sex, was laid to rest (at least on a constitutional level) in Geduldig v. Aiello, 417 U.S. 484 (1974). There the Court, in discussing the absence of class-based discrimination, stated:

> The California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition --pregnancy -- from the list of compensable disabilities. While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification like those considered in Reed and Frontiero. Normal pregnancy is an objectively identifiable physical condition with unique characteristics. Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against members of one sex or the other, Lawmakers are constitutionally free to include or exclude

> pregnancy from the coverage of legislation as this on any reasonable basis, just as with respect to any other physical condition.
>
> The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups -- pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes. The fiscal and actuarial benefits of the program thus accrue to members of both sexes.

417 U.S. at 496-97 n. 20. Given the obvious factual parallels, then, between this action and Geduldig, we believe we are precluded from considering the classifications here based on pregnancy as sex-based classifications.

Noting the language of the Geduldig Court that distinctions based on pregnancy are not class-based

> absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against members of one sex or the other,

brings us to the next fatal deficiency in plaintiffs' allegation of § 1985(3) jurisdiction. There is no explicit allegation that defendants Blue Cross or Blue Shield, in placing restrictions on coverage for normal pregnancy, acted with the requisite class-directed animus a crucial limitation on the reach of the statute. After noting that the changes in § 1985(3) from original draft to final form were interpreted by the legislators responsible for drafting the statute as an attempt to emphasize the animus or motive required under the statute, the Court went on to say:

> The constitutional shoals that would lie in the path of interpreting § 1985(3) as a general federal tort law can be avoided by giving full effect to the congressional purpose -- by requiring, as an element of the cause of action, the kind of invidiously discriminatory motivation stressed by the sponsors of the limiting amendment.

402 U.S. at 102. The Court then went on to say in a footnote:

> The motivation requirement introduced by the word "equal" into the portion of § 1985(3) before us must not be confused with the test of "specific intent to deprive a person of a federal right made definite by decision or other rule of law" articulated by the plurality opinion in Screws v. United States. . . for prosecutions under 18 U.S.C. § 242. Section 1985(3), unlike §242, contains no specific requirement of "wilfulness." . . . The motivation aspect of §1985(3) focuses not on invidiously discriminatory animus.

Id. at 102 n.10. In the pleadings filed in Griffin, the Court pointed out, plaintiffs alleged the requisite animus by stating that defendants deprived plaintiffs "of the equal enjoyment of legal rights because of their race." Id. at 103 (emphasis added). Following Griffin lower courts have been careful to determine whether or not any claimed injury was inflicted allegedly because of plaintiff's status as a member of a particular class. In Hughes v. Ranger Fuel Corp., 467 F.2d. 6, 10 (4th Cir. 1972), the court of Appeals for the Fourth Circuit found no jurisdiction under § 1985(3) because

> There is no averment in the complaint that the defendants attacked the plaintiffs because the latter were environmentalists . . . . Theirs was a purely spontaneous act, not alleged to be a part of any general pattern of discriminatory action directed to any class.

(Emphasis added); accord Arnold v. Tiffany, 487 F.2d 216 (9th Cir. 1973), cert. denied, 415 U.S. 984 (1974).

Although courts will construe a complaint liberally to locate allegations of discriminatory animus, our most liberal construction of plaintiffs' complaint fails to reveal the necessary allegations. In Richardson v. Miller, 446 F.2d 1247, 1249 (3d Cir. 1971), the Court of Appeals for the Third Circuit, noting approvingly "the trend in recent decisions to 'accord (to the civil rights statutes) a sweep as broad as (their) language,"

"found the following allegations sufficient statements of discriminatory intent:

> That the . . .discrimination arose because of plaintiff's . . .advocacy of constitutional and legal rights; his opposition to the defendants' policy of hiring only gentile Caucasians.
>
> Further, the defandants so conspired because they could not condone plaintiff's advocacy of racial equality and his opposition to the practice of racial intolerance and discrimination that existed within the corporate structure in Greensburg.

446 F2d at 1248 n.1. The court did say, however, that the issue of whether or not these allegations were sufficient was close. If, ideed, Richardson was a close case, then the complaint in this action, lacking as it does any allegation of discriminatory animus or hostile motive, is clearly insufficient to allege a cause of action under § 1985(3).

In sum, having found no federal jurisdictional base for plaintiffs' cause of action, under either § 1983 or § 1985(3), [16] [17] we must dismiss plaintiffs' complaint.

J.

[16] Although plaintiffs do not make any such allegation in their complaint, they allege shortly and vaguely in one or more of their briefs the existence of a conspiracy between defendants and employers violative, apparently, of Title VII. Because plaintiffs have not at all defined the contours of this allegation, we will not consider it. Finally, because we find no federal jurisdiction here, we will not

consider plaintiffs' claims under the Pennsylvania Constitution.

17

Just as we were about to issue this Memorandum and Order, we received a copy of the very recent decision of the Court of Appeals for the Third Circuit in Broderick v. Associated Hospital Service of Philadelphia, F.2d (3d Cir. May 6, 1976). In Broderick the Third Circuit affirmed a finding by Judge Cahn of this Court that the nexus between the Pennsylvania Insurance Department and the certain enrollment practices of Blue Cross and Blue Shield which imposed restrictions on married women was not sufficiently close to transform the conduct of Blue Cross and Blue Shield into state action. Plaintiffs' principal difficulty both at the district and the circuit level appears to have been their studied refusal to heed Justice Rehnquist's admonition in Jackson that "detailed inquiry may be required in order to determine whether the (state action) test is met." 419 U.S. at 351. Both courts relied on the barrenness of the record in dismissing the suit for lack of subject matter jurisdiction. Writing for two of the three-member panel on the circuit level, Judge Garth does emphasize, however, that a particular lack in the record is its failure to show that the enrollment practices complained of were ever presented to the Pennsylvania Insurance Deparment for approval. We do not believe that this finding necessarily implies that state approval of a certificate containing a printed statement of such practices would automatically convert the insurers into state actions. We note that Judge Garth would require, for a finding of state action, proof "that Pennsylvania has 'put its own weight' (Jackson at 357) on the side of the privately initiated enrollment practice." Under Jackson, as we read it, prior state approval of a certificate or contract of insurance containing objectionable provisions initiated by a private insurer, does not, without more, rise to the level of state action. Finally, we note our full agreement with Judge Seitz's concurring opinion.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

NO. 76-1774

HELEN McCAFFREY JACKSON, ET AL.,
Petitioners

v.

ASSOCIATED HOSPITAL SERVICE
OF PHILADELPHIA, ET AL.,
Respondents

BRIEF IN OPPOSITION FOR RESPONDENT ASSOCIATED HOSPITAL SERVICE OF PHILADELPHIA

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July 13, 1977

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QUESTION PRESENTED

Did not the courts below correctly conclude that petitioners had failed to establish a basis for federal jurisdiction (a) where the challenged conduct was that of private entities operating independently and differently and without any nexus between their conduct and the state, and (b) where a private conspiracy was alleged but there was no contention that such conspiracy was motivated by a class-based, invidiously discriminatory animus?

STATEMENT OF THE CASE

The Petition for Certiorari comes before this Court following dismissal of plaintiffs' Complaint for lack of federal jurisdiction—and not (contrary to the assertion of the Petition) for failure to state a cause of action.

Petitioners asserted the existence of federal jurisdiction based upon alleged violations by respondents of 42 U.S.C. §§ 1981, 1983, and 1985 and of the First, Fifth, Ninth, and Fourteenth Amendments to the Constitution of the United States. In their Answers, respondents denied the existence of federal jurisdiction.

Subsequent to the decision of this Court on December 23, 1974, in *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345 (1974), the District Court ordered the parties to complete discovery, to submit a stipulation of facts on the jurisdictional issues, and to brief those issues. Petitioners conducted extensive discovery. A stipulation of facts with numerous exhibits was filed. Briefs were filed. Oral argument was heard. The District Court concluded that the record disclosed no basis for federal jurisdiction. (Petition for Certiorari A-6.)

Petitioners are six females and two males who alleged that they have been discriminated against by respondents on the bases of their sexes and their religious beliefs. Petitioners contend that respondents' conduct violates petitioners' preference that pregnancies be terminated by live births rather than by any other event.

Respondent, The Associated Hospital Service of Philadelphia (hereinafter identified as "Blue Cross"), is a nonprofit corporation which operates a nonprofit hospital plan providing certain hospital services to its subscribers. Blue Cross is a separate and distinct entity from respondent, The Medical Service Association of Pennsylvania (hereinafter "Blue Shield"), a nonprofit corporation pro-

viding certain medical services to its subscribers. Some, but not all, Blue Cross subscribers are also Blue Shield subscribers; similarly, some, but not all, Blue Shield subscribers are also Blue Cross subscribers. The Insurance Commissioner and Secretary of Health of the Commonwealth of Pennsylvania are also respondents.

Like all Pennsylvania corporations Blue Cross and Blue Shield owe their existences to enabling legislation. Like all insurers in Pennsylvania they are subject to specific statutory regulation and to the administrative regulation of the Pennsylvania Insurance Department.

Blue Cross operates primarily in the counties of Philadelphia, Montgomery, Delaware, Chester, and Bucks in southeastern Pennsylvania. It is one of five "Blue Cross" plans in Pennsylvania.

The challenged conduct of Blue Cross is the provision in *some* of its agreements with its subscribers that hospital benefits related to giving birth be provided only: (1) if the Blue Cross subscriber is enrolled under family coverage at a subscription rate in excess of that charged to a single person (Complaint, ¶¶ 15 and 16); (2) if the subscriber has been enrolled for eight consecutive months (Complaint, ¶¶ 15 and 16); and (3) if the subscriber is married (Complaint, ¶ 16). Petitioners also object to the limitation of six days of hospital benefits for birth. (Complaint, ¶ 18).

Petitioners object to Blue Cross' historical policy of treating miscarriages and abortions differently from births. For hospital services for miscarriages and abortions Blue Cross does not require an eight-month waiting period, does not require coverage under the family plan, and does not impose a six-day limitation on hospital stays.

These alleged differences in coverages, petitioners contend, discriminate against petitioners' "civil rights to bear children" and "religious beliefs." (Complaint, ¶ 20). Also, petitioners contend that they are being discriminated

against in that they are required to pay higher premiums to underwrite the hospital benefits being provided to persons having abortions. (Complaint, ¶ 21).

Petitioners fail to note that among the exhibits before the district court were two Blue Cross contracts in which some of the challenged contractual provisions do not appear. One exhibit was an example of a Blue Cross agreement which provides maternity benefits to all females (including unmarried minor female dependents) without any requirement that unmarried females be enrolled in family coverage. Another exhibit was an agreement in which Blue Cross had waived any waiting period for maternity coverage. Other material provisions of the Blue Cross subscription agreements before the district court were, for example, a general provision that for complications of pregnancy the subscriber may utilize the maximum number of days available under her agreement (and not be limited to a six-day hospitalization); limitations for non-maternity hospitalizations; and limitation of all hospitalizations to what is reasonable and necessary. Further, the eight-month waiting period for maternity benefits in some agreements is more favorable than the usual twelve-month waiting period applicable to pre-existing conditions.

Blue Cross' conduct is alleged to be that of the state "because the state of Pennsylvania through its Insurance Commissioner and Secretary of Health license [Blue Cross and Blue Shield] and approve contracts" [*sic*] allegedly containing the challenged provisions. (Complaint, ¶ 25). Also, it is alleged that Blue Cross "operates under the supervision of the Insurance Department of the Commonwealth of Pennsylvania. . . ." (Complaint, ¶ 4).

Finally, petitioners allege a conspiracy by the four respondents against petitioners and the class they seek to represent. (Complaint, ¶ 23). The "class", although never

specifically defined, is variously referred to as "all females" and "all subscribers" (female and male) allegedly injured by the challenged conduct. (Complaint, ¶ 26).

Petitioners also fail to note that the challenged Blue Cross subscription agreement was "approved" by the Pennsylvania Insurance Department long before the 1973 decisions of the United States Supreme Court and the Pennsylvania Supreme Court holding restrictions on abortion unconstitutional. Thus, at the time the challenged agreements were adopted by Blue Cross, elective abortion was illegal in Pennsylvania and the challenged benefits related primarily to miscarriages and the very few therapeutic abortions then permissible under Pennsylvania law.

Although petitioners state as "facts" many matters not of record as well as many matters which are simply incorrect, it is not necessary to this Court's review that such statements be specifically rebutted at this time.

ARGUMENT

I. The courts below correctly decided that the facts of record clearly demonstrated that the challenged conduct was private and that there was no state action such as would confer federal jurisdiction.

The mere statutory requirement of prior approval by the Insurance Department of Blue Cross' rates and subscription agreements without a relationship to the challenged practice is insufficient to establish state action.

Blue Cross was originally organized pursuant to the Non-profit Hospital Plan Act, Act of June 21, 1937, P.L. 1948, 40 P.S. (Pa.) § 1401 *et seq.* That statute was amended by the Act of Nov. 15, 1972, P. L. , No. 271, 40 Pa. C.S.A. § 6101, *et seq.* Those statutes provide for the prior approval by the Insurance Department of Pennsylvania of Blue Cross' rates charged to subscribers, rates of payments to hospitals, acquisition costs in connection with solicitation of subscribers, reserves, certificates representing agreements with subscribers, and contracts with hospitals.

The authority conferred on the Insurance Department by these statutory provisions is the primary basis for petitioners' assertion that the challenged conduct constitutes state action. The challenged conduct, however, involves Blue Cross' underwriting requirements relating to waiting periods for, and persons entitled to, maternity benefits and relating to contractual limitations on hospital stays for maternity. Petitioners complain that these requirements are more stringent with regard to maternity (i.e., live birth) than with regard to abortion.

In determining that there was no state action, the district court correctly applied the holding of this Court in *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345 (1974). In *Jackson* this Court held:

> The mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment. *Moose Lodge No. 107* v. *Irvis, supra.* at 176-177. Nor does the fact that the regulation is extensive and detailed, as in the case of most public utilities, do so. *Public Utilities Comm'n* v. *Pollack,* 343 U.S. 451, 462 (1952). 419 U.S. at 350.

This Court set forth in *Jackson* what inquiry must be made by federal courts in determining whether allegedly wrongful conduct will be deemed to be state action:

> But the inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself. 419 U.S. at 351.

The district court made the required inquiry. It correctly analyzed the requirements of *Jackson* and concluded that the conduct of which petitioners complained did not constitute state action.

Petitioners contend that the district court erred because the conduct challenged by them was specifically approved by the Pennsylvania Insurance Department pursuant to statutory mandate. This is incorrect factually. Moreover, even if factually accurate, this would not constitute state action under *Jackson.*

The challenged conduct is, with respect to Blue Cross, Blue Cross' policy of requiring *in some instances* different limitations on benefits for hospitalizations for live births than for all other terminations of pregnancies. These underwriting requirements have never been the subject of action of the Insurance Department. Not only did petitioners submit nothing to show state regulation, but many

of the very documents relied upon by petitioners demonstrated the absence of state action.

Central to an understanding of the underlying facts is awareness that prior to 1973 elective abortions were unlawful in Pennsylvania by reason of the Act of June 24, 1939, P.L. 872, §§ 718-719, 18 P.S. §§ 4718-4719. Following the decision of the United States Supreme Court on January 22, 1973, in *Roe* v. *Wade*, 410 U.S. 113, the Pennsylvania Supreme Court held on March 29, 1973, that the Pennsylvania abortion statute was unconstitutional. *Commonwealth* v. *Page*, 451 Pa. 331, 303 A.2d 215 (1973).

Since that time the Insurance Department has had no occasion to pass upon the Blue Cross subscription agreements which petitioners challenge.

At the time that Blue Cross submitted the relevant subscription agreements to the Insurance Department for review, there was no reason to consider the issues raised by petitioners herein because only involuntary premature terminations of pregnancy were within the scope of the agreements. (Otherwise, those portions of the agreements would then have been void for illegality.) Not surprisingly, therefore, the state had no occasion to review the alleged disparity.

Further, neither the enabling statutes nor the Insurance Department's regulations confer on the Department the right to review underwriting requirements of Blue Cross Plans. And the underwriting requirements have not been reviewed. For example, the record below showed that Blue Cross changed from a nine-month to an eight-month waiting period for maternity benefits in 1969 without any Insurance Department hearings. Also, there was evidence that providing maternity benefits on family or single contracts was a matter of underwriting, rather than of contracts or rates. Blue Cross' underwriting requirements are not subject to Insurance Department review. *Broderick* v. *Associated Hospital Service of Philadelphia*, 536 F.2d 1 (3d Cir. 1976).

The flaw in petitioners' position becomes even more obvious when it is recognized that Blue Cross does make available on some group contracts hospital benefits for live birth without waiting periods and without regard to marital status. The state's conduct in "approving" Blue Cross agreements in this area is neutral.

In an attempt to avoid the inevitable result of *Jackson*, therefore, petitioners contend that there exists a symbiotic relationship between Blue Cross and the Commonwealth of Pennsylvania such as was found in *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961). Petitioners' reference to *Burton* is inapposite. In that case the state had insinuated itself into a position of interdependence with a private restaurant to the extent that it was a joint participant in the restaurant enterprise. No such interdependence exists in the present case. Blue Cross does not lease any facilities from the Commonwealth of Pennsylvania. Blue Cross alone is responsible for the provision of hospital services to its subscribers. Although it pays no taxes (other than unemployment compensation and F.I.C.A. taxes), this exemption is common to all nonprofit corporations.

Petitioners contend that "Blue Cross has seven public directors appointed by the Governor, Mayor, etc." (Petition at p. 6.) Actually, Blue Cross' directors are elected by its subscribers (except that its president and the chairperson and vice-chairperson of its Consumer Advisory Committee are ex-officio directors). The Governor of Pennsylvania, Mayor of Philadelphia, President of City Council of Philadelphia, and each of the Boards of Commissioners of the Counties of Bucks, Chester, Delaware, and Montgomery are permitted to submit one nominee to the nominating committee. All nominees must stand for election. There are 37 directors.

Blue Cross enjoys no special relationship with any governmental entity. It competes with profit-making insurers for the opportunity to insure public employees, and as to those agreements on which it competes successfully it is like any other governmental supplier.

The mere regulations of Blue Cross by the Insurance Department does not constitute symbiosis. See *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163 (1972).

The record below demonstrated conclusively that Blue Cross—like Metropolitan Edison Company—is a heavily regulated private corporation, not unlike all insurance companies operating in Pennsylvania which are also heavily regulated under separate statutes. This is insufficient to connect the conduct of Blue Cross to the Commonwealth so as to make Blue Cross' conduct attributable to the Commonwealth. *Jackson* v. *Metropolitan Edison Co., supra.*

Nor is this a public function case such as *Marsh* v. *Alabama*, 326 U.S. 501 (1946), *Terry* v. *Adams*, 345 U.S. 461 (1953), or *Evans* v. *Newton*, 382 U.S. 296 (1966). Blue Cross does not exercise a power delegated to it by the Commonwealth which is traditionally associated with sovereignty. There is no obligation of the Commonwealth to provide hospital insurance. Nor is hospital insurance or provision of hospital services traditionally the exclusive prerogative of the Commonwealth. Accordingly, Blue Cross is not serving a public function.

Neither the record in this matter nor even the allegations of the Complaint disclose the existence of state action. To the contrary, the Commonwealth is clearly neutral on the matters which petitioners contest. The Commonwealth's conduct has allowed Blue Cross to alter at will its waiting period for maternity benefits and to waive its requirements where it so desires; it has permitted Blue Cross to provide maternity coverage to unmarried females without requiring those persons to enroll for family coverage. Although there is a limitation

on hospital stays for maternity under the Blue Cross of Greater Philadelphia agreements, there is no such limitation under the agreements of Blue Cross of Northeastern Pennsylvania which are also subject to Insurance Department approval.

Petitioners' contention that state action exists because Blue Cross' conduct is allegedly in violation of its contracts does not merit serious consideration.

Similarly non-meritorious is petitioners' contention that state action can be found by reason of the Insurance Department's failure to act. Initially, it is doubtful that the Insurance Department can affirmatively require Blue Cross to change its coverages. Although the Insurance Department has in recent years raised questions concerning maternity coverage, no action has been taken.

All the foregoing matters were considered by the district court and the court of appeals. Their decisions were in complete harmony with the controlling decisions of this Court.

Even if petitioners had met the threshold jurisdictional requirement, however, their cause of action would be non-meritorious. The state has broad power to encourage actions deemed to be in the public interest, and making either childbirth or abortion economically more attractive is not an impingement on a Constitutional right so long as no restriction on access to the alternative is imposed. *Maher* v. *Roe*, 45 U.S. L.W. 4787 (U.S. June 20, 1977).

II. The courts below correctly decided that no facts were pleaded or offered which would support a finding of federal jurisdiction under 42 U.S.C. § 1985.

Prior to the decision in *Griffin* v. *Breckenridge*, 403 U.S. 88 (1971), it had been thought that 42 U.S.C. § 1985(3) reached only conspiracies arising under color of state law. In *Griffin* it was held that 42 U.S.C. § 1985(3) does reach private conspiracies to deprive others of cer-

tain rights, privileges, and immunities but only where there is an invidiously discriminatory motivation on the part of the alleged conspirators. 403 U.S. at 102. § 1985(3) was not intended to confer federal jurisdiction over all conspiratorial interferences with the rights of others. 403 U.S. at 101. There must be an intent to deprive off *equal* protection or *equal* privileges and immunities, and therefore " . . . there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behiind the conspirators' action. The conspiracy, in other wordss, must aim at a deprivation of the equal enjoyment of rights secured by the law to all." 403 U.S. at 102. Decisicon was specifically reserved as to whether § 1985(3) applied to discrimination on any basis other than race. 403 U.S. at 102 n.9.

The absence of a conspiracy arising under thee color of state law has been demonstrated by the immeediately preceding section of this Brief. Petitioners have similarly failed to set forth any basis for federal jurisdictiom under § 1985(3) and have failed to plead a cause of actiom under that statute.

Petitioners contend that they have brought themselves within the ambit of § 1985(3) by pleading in Parragraph 23 of their Complaint that respondents "conspireed with each other for the purpose of depriving the Plaintiiffs and the class they represent of equal protection of the laws and of equal privileges and immunities. . . ." Whatt class? Neither the Complaint nor the Petition for Cerrtiorari identifies the class. Indeed, in their Petition, petiitioners assert at page 17: "The limits of the class depemd ultimately on which constitutional right the court hmolds is violated."

It cannot reasonably be contended that respoondents had a class-based animus when petitioners themselves admit that the "class" cannot be determined untiil some court finds that some constitutional right hass been violated.

Petitioners allege in Paragraph 20 of the Complaint that they are being discriminated against "for their religious beliefs." They also allege in Paragraph 25 of the Complaint that respondents' conduct denies Blue Cross and Blue Shield subscribers "freedom of choice, conscience and religion." Nowhere else is religion mentioned by petitioners. Indeed, in Paragraph 21 it is alleged that respondents' conduct discriminates against *all* subscribers of Blue Cross and Blue Shield.

There was no allegation that petitioners all belong to any particular religion, but in their brief in the Court of Appeals and in their Petition for Certiorari petitioners say that they are all Catholics. Yet it is not alleged nor contended that Catholics are the target of the "conspiracy." Moreover, petitioners speak only of their religious beliefs and fail to suggest how their free exercise of religion has been affected, or how it could be affected.

There is, of course, no allegation of class-based discriminatory animus. The absence of this essential allegation of a § 1985 action is fatal to petitioners' action.

Not only have petitioners failed to make the requisite clear showing of invidious, purposeful and intentional discrimination, but they have alleged in effect that respondents' conduct is nondiscriminatory since it falls equally on all subscribers. (Complaint at ¶¶ 21 and 25.)

In addition, it is clear from the chronology of Blue Cross' conduct that there could have been no intent to discriminate against persons of any particular religious belief. The challenged differences in treatment of benefits for live birth as opposed to benefits for abortion commenced at least as early as 1961. At that time, elective abortion was illegal in Pennsylvania. Thus, the different requirements for hospitalization arising out of pregnancies terminating other than in live birth related only to mis-

carriages and therapeutic abortions. There is no suggestion that provision for such occurrences (which, at that time, were actuarially insignificant in relation to live births) was or is violative of any religious belief. To the contrary, it is clear that petitioners' objection is solely with provision of hospital benefits for elective abortions which have become legal only since 1973—long after the challenged provisions were adopted.

Similarly, petitioners fail to set forth facts from which invidious discrimination on the basis of sex can be found. It is alleged that respondents' conduct has caused harm equally to petitioners, some of whom are female and some of whom are male. More significantly, it is clear that disparity of treatment for pregnancy-related benefits does not in itself constitute a denial of equal protection or of equal privileges and immunities. *Geduldig* v. *Aiello*, 417 U.S. 484 (1974), *General Electric* v. *Gilbert*, 97 S. Ct. 401 (U.S. Dec. 7, 1976).

Moreover, the basic charge of conspiracy between Blue Cross and Blue Shield is belied by the very instance of alleged harm cited by petitioners in their Complaint. Petitioners, Helen and Andrew Jackson, claim that Blue Cross wrongfully failed to pay their claim for hospital benefits for the birth of their child, Andrew McCaffrey Jackson. But their claim against Blue Shield for medical services for that same birth was paid by Blue Shield.

Even if petitioners had pleaded or submitted facts[1] sufficient to invoke federal jurisdiction under 42 U.S.C.

[1] Petitioners' assertion that they were permitted no discovery on the conspiracy issue is mistaken. They sought no discovery for the first 16 months after the Complaint was filed. Thereafter, they took extensive discovery seeking to find some basis for their allegations and submitted to the district court matters which they contended were supportive of their conspiracy theory. Petitioners are similarly mistaken about the briefing of the § 1985(3) claim. This issue was discussed at length at pages 3 through 8 of the Response of Defendant Blue Cross to Plaintiffs' Brief on Jurisdictional Issues, in which *Griffin* v. *Breckenridge*, *supra*, and its progeny were analyzed at length.

§ 1985(3), however, the challenged conduct does not constitute a violation of any protected right, privilege or immunity of petitioners. *Maher* v. *Roe*, *supra*. There is no discrimination against a suspect class where an economic incentive is provided for one of two alternative methods of terminating pregnancy. *Id.*

III. There is no conflict between the decisions of the Third and Sixth Circuits.

Petitioners contend that the decision of the Third Circuit is in conflict with that of the Sixth Circuit in *Meredith* v. *Allen County War Memorial Hospital Commission*, 397 F.2d 33 (6th Cir. 1968). In *Meredith*, it was found that the challenged conduct occurred under color of law, but that case was decided prior to this Court's controlling decision in *Jackson* v. *Metropolitan Edison Co.*, *supra*. Further, Blue Cross receives no state or federal funds except for services rendered on a contractual basis.

CONCLUSION

For the reasons set forth above the Petition for Writ of Certiorari should be denied.

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